

No. 44013-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDREW C. STRICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge
Cause No. 12-1-00653-2

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

On Brief:
Elisa J. Wood, Rule 9 Legal Intern

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecutor did not commit prosecutorial misconduct in his closing argument because the references to Andrew Strick's prior conviction was admitted as evidence of motive and the prosecutor's use of this evidence was not improper, nor was the reference to the prior conviction "flagrant and ill-intentioned" to warrant a reversal.

B. STATEMENT OF THE CASE

1. Procedural Facts

The State accepts Andrew Strick's statement of the procedural facts.

2. Substantive Facts

On May 16, 2012, John Wilkinson drove to his landlord Thelma Wilson's house to borrow a lawnmower. RP 74. When he discovered that his landlord was not home, Wilkinson returned to his vehicle. RP 74. Parked directly behind his car, Wilkinson spotted his neighbor, Andrew Strick, waiting in his car. RP 76-77. Wilkinson was startled to see Strick as Strick had once threatened to kill Wilkinson. RP 64, 66, 67. This threat resulted in the conviction for felony harassment in 2010 and Strick was also ordered to stay at least 1,000 feet away from Wilkinson for five years. RP 64, 66, 67. Despite this, Strick did not leave the area of

Wilson's home when he saw Wilkinson, and instead, Strick remained in his car, grinning and staring at Wilkinson. RP 77.

Moments later, Strick approached Wilkinson at his vehicle. RP 79. While Wilkinson began to get into his truck, Strick pepper-sprayed Wilkinson in his eyes, face, ears, and neck. RP 79. Wilkinson had a pocketknife on him and though already blinded by the pepper spray, he waved it around in the air to try and stop the assault. RP 87.

Wilson's neighbors, Roderick and Julia Mittelstaedt, overheard Wilkinson yelling in pain outside, got in their van, and drove to his aid. RP 95. Both neighbors testified that the stream of pepper spray Strick used against Wilkinson was "constant." RP 95-96; 112. Roderick Middelstaedt testified that he never saw Wilkinson make any aggressive or confrontational action towards Strick, stating that he "couldn't" have done so given the constant stream of pepper spray projected all over Wilkinson's face and upper body. RP 101.

Strick ceased spraying Wilkinson when he noticed Middelstaedt parked in a nearby driveway. RP 96. Strick then approached the Middelstaedts' vehicle, slammed his hands holding handcuffs and a leather bag twice against their windshield, and

repeatedly yelled, “Cash and cuffs, that’s all I need.” RP 96, 114. When Strick returned to Wilkinson, Judith Middelstaedt testified that Strick asked Wilkinson whether he’d “had enough yet.” RP 117. When Middelstaedt told his wife to call the police – all the while Wilkinson was wailing from the constant, intense pain in his eyes and on his skin from the pepper spray – Strick fled. RP 99, 102, 116-117.

Once Strick left the scene, Middelstaedt and another neighbor used a garden hose to wash off the thick layer of pepper spray from Wilkinson’s face, neck, and upper body. RP 82-83, 118. The pepper spray was pooled so thick in Wilkinson’s eye ducts and ears that the neighbors needed to use Q-tips to get it out. RP 82-83, 119.

Deputy Donald Wall arrived at 13835 Vail Cutoff Road shortly thereafter, observing the neighbors still cleaning the pepper spray off of Wilkinson. RP 143, 145. Upon his arrival, Roderick Middelstaedt gave Wall the license plate number of the assailant’s vehicle, which matched the registration for Strick. RP 140. Using the information provided to him from Wall, Deputy Mike Brooks was dispatched to Strick’s address on Taryton Lane. RP 170. Wall met with Brooks at Strick’s address, where Strick was already

handcuffed and detained. RP 156, 170-171. Strick claimed self-defense because Wilkinson was charging at him with a screwdriver. RP 174.

While speaking with Wall and while testifying at trial, Strick claimed to be at Wilson's residence on assignment for a tax attorney as part of his duties as a constable with the Washington State Auditor's Office. RP 158-159, 178. Later testimony from Deputy State Auditor, Chuck Pfeil, entirely refuted Strick's claims of employment with the State Auditor's Office, testifying that there was no constable position with the State Auditor's Office. RP 241-242. Strick testified in his own defense and admitted he had pled guilty to felony harassment against Wilkinson. RP 184-189.

C. ARGUMENT

The prosecutor did not commit prosecutorial misconduct in his closing argument because the references to Andrew Strick's prior conviction were admitted and used as evidence of motive; therefore the prosecutor's use of this evidence was not improper, nor was the reference to the prior conviction "flagrant and ill-intentioned".

Strick does not dispute that he pepper-sprayed Wilkinson on May 16, 2012, nor does he dispute that he pled guilty to felony harassment in 2010. His only argument on appeal is that the prosecutor used Strick's prior conviction as inadmissible propensity

and credibility evidence during closing arguments. Appellant's Opening Brief at 5.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (*citing State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). These "rules of procedure apply equally to a defendant represented by counsel or appearing pro se." State v. Hoff, 31 Wash. App. 809, 812, 644 P.2d 763, 765 (1982) (*citing Bonney Lake v. Delany*, 22 Wash.App. 193, 196, 588 P.2d 1203 (1978)). Therefore, a pro se defendant, like any defendant represented by counsel, "may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Hoff, 31 Wash. App. at 812; Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960).

A reviewing court first determines whether the challenged comments were in fact improper. In doing so, the reviewing court examines the allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given to the jury, and the evidence addressed in the argument. State v. Russell,

125 Wn.2d 24, 85-86, 882 P.2d 747 (1994); see also Dhaliwal, 150 Wn.2d at 578.

If the court finds that the comments were improper, then the court considers whether there was a “substantial likelihood” that the jury was affected by the comments. Dhaliwal, 150 Wn.2d at 578. Both the Sixth Amendment and Const. Art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Dhaliwal, 150 Wn.2d at 578; State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The absence of an objection by the defense “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). In fact, a defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that

could not have been neutralized by a curative instruction to the jury.” Id.; Russell, 125 Wn.2d at 85.

A prosecutor is a quasi-judicial officer who must act impartially and who has a duty to advocate the State's case against an individual. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). While in closing argument the prosecutor has wide latitude to draw reasonable inferences from the evidence, a prosecutor may not suggest that evidence not presented provides additional grounds for convicting the defendant. Russell, 125 Wn.2d at 87. (citing United States v. Garza, 608 F.2d 659 (5th Cir. 1979)).

It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

Further, “when the State’s evidence contradicts a defendant’s testimony, a prosecutor may infer that the defendant is lying or unreliable.” State v. Miles, 139 Wn. App. 879, 890, 62 P.3d 1169 (2007).

The trial court granted the State’s motion to admit Strick’s 2010 felony harassment conviction under ER 404(b) for the limited purpose of proving his motive to assault Wilkinson on May 16, 2012. RP 14-16. Strick argues in his Opening Brief that the prosecutor improperly used the prior conviction as means to attack his credibility and to show his propensity to commit the act. Appellant’s Opening Brief at 5.

When viewing the totality of the argument, the prosecutor’s comments were not improper because the prosecutor only mentioned Strick’s prior conviction within the context of establishing motive and did not focus the jury’s attention on the prior conviction. RP 268-269, 272, 278. For a majority of the prosecutor’s 30-40 minute argument, he focused the jury’s attention on the testimony of the victim and two witnesses. RP 257-284; CP 32. Both of the State’s witnesses stated under oath that Wilkinson not only did not make any aggressive action towards Strick to support Strick’s claim of self defense, but that the pepper spray incapacitated Wilkinson,

rendering him unable to defend himself, let alone act aggressively towards Strick. RP 101, 112.

Strick testified that his motive for being at Wilson's house at the time that Wilkinson was present was to conduct an investigation of Wilson on behalf of the State Auditor's Office. RP 178, 192-194. Once he testified about his motive for being at Wilson's home, he in effect invited the prosecutor to introduce evidence to show that he was lying. La Porte, 58 Wn.2d at 822. Each time the prosecutor referenced Strick's prior conviction, the prosecutor only did so either to prove Strick's motive or, similarly, to show that the evidence did not support Strick's theory. See State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

In trial and in closing arguments, the prosecutor challenged Strick's theory on motive in two ways. First, during trial, the prosecutor introduced a State Auditor who testified that there was no record of Strick ever working for the State Auditor and that no such position of constable existed. RP 240-242. Later in his closing argument, the prosecutor referenced Strick's "nebulous job" as his motive for being at Wilson's home. RP 268, 275. The prosecutor then introduced an alternative theory, one that showed that Strick's

prior conviction in 2010 was evidence of his motive to approach Wilkinson on May 16, 2012. RP 272-274. The evidence could be used under these circumstances because it was within the trial court's ER 404(b) ruling on Strick's prior conviction.

Strick also claims that the prosecutor improperly used the prior conviction as propensity evidence. Appellant's Opening Brief at 6, 7. In his closing argument, the prosecutor refers to "all that history," but this is specifically referring to Strick and Wilkinson's history of conflict as neighbors, not Strick's criminal history. RP 273. The prosecutor properly argued that the history of conflict between the neighbors was additional evidence as Strick's motive to be at the Wilson residence at the same time as Wilkinson. RP 272-273. Even if this Court finds that the comments were error in this regard, the prosecutor briefly referred to Strick's prior conviction three or four times out of a total 30-40 minute closing argument. CP 32. In viewing the totality of the argument and the permitted context in which it was used, the prosecutor's referral to Strick's prior conviction cannot be said to be improper or prejudicial.

Not only were the prosecutor's comments regarding Strick's prior convictions not improper, but the comments also did not prejudice Strick. Strick did not deny assaulting Wilkinson with

pepper spray. RP 179, 208-209. Rather, he claimed self-defense. RP 179, 205. The prosecutor is permitted to introduce evidence that refutes the Appellant's theory on the case. In closing arguments, the prosecutor refuted Strick's claim of self-defense through the testimony of the victim and two witnesses. RP 101, 112. The evidence of Strick's prior convictions cannot have prejudiced Strick when considering the totality of the prosecutor's argument referencing the victim and witness testimony that Wilkinson did not make any aggressive action against Strick to warrant a claim of self-defense.

Finally, Strick failed to object at the time of the prosecutor's closing argument. Therefore, even if this Court finds that the comments were error, Strick's silence constitutes a waiver of error that the argument was improper. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The only exception to this waiver is if Strick shows that the prosecutor's comments were "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Russell, 125 Wn.2d at 85. The prosecutor did not commit prosecutorial misconduct in closing arguments because the prosecutor properly admitted and used Strick's prior conviction as

evidence of motive, this evidence did not prejudice Strick when viewing the totality of the argument and jury instructions, and Strick failed to object to the comments at the time of closing arguments, constituting a waiver of error.

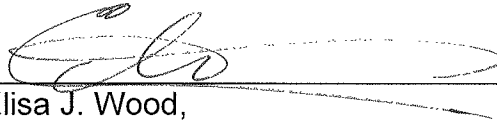
D. CONCLUSION

WHEREFORE, for the foregoing authorities and argument, the State of Washington respectfully asks that this Court affirm Strick's conviction.

Respectfully submitted this 27th day of June, 2013.



Carol La Verne, WSBA# 19229
Attorney for Respondent



Elisa J. Wood,
Rule 9 Legal Intern #1926110

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

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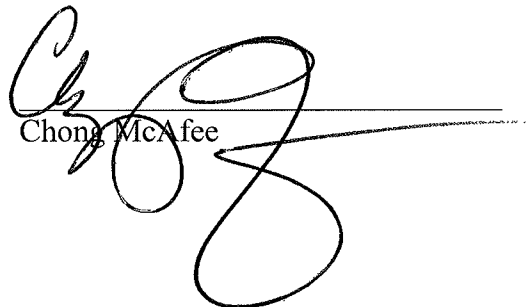
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TACOMA, WA 98402-4454

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THOMAS E. DOYLE, ATTORNEY FOR APPELLANT
TED9@ME.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of June, 2013, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

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